Decision ___________________________

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U 338-E) for Order Approving Settlement Agreement between Southern California Edison Company and Salton Sea Power Generation L.P., et al.	Application 03-07-027 (Filed July 11, 2003)

OPINION ADOPTING SETTLEMENT AGREEMENT

1. Summary

This decision approves a settlement resolving litigation between Southern California SCE Company (SCE) and a qualifying facility (QF),[1] Salton Sea Power Generation L.P. et al. (Sellers). The settlement reflects a fair compromise of contentious litigation between SCE and the QF.

2. Background

SCE filed this application on July 11, 2003 seeking approval of a settlement that would resolve two pending lawsuits involving eight separate contracts between SCE and Sellers. SCE filed a supplemental application on February 18, 2004, which made substantive changes to the original settlement. SCE's application, as amended, describes the events leading to the lawsuits,

[1] A QF is a small power producer or cogenerator that meets federal guidelines and thereby qualifies to supply generating capacity and electric energy to electric utilities. Utilities are required to purchase this power at prices approved by state regulatory agencies.

the process for resolving the lawsuits and the settlement terms. SCE seeks expedited ex parte approval of the settlement. No party protested the application or otherwise participated in this proceeding.

3. Discussion

A. Test for Approving Settlement Agreements

In determining whether a settlement is fair, adequate, and reasonable, the Commission reviews a number of factors. These factors include whether the settlement reflects the relative risks and costs of litigation; whether it fairly and reasonably resolves the disputed issues and conserves public and private resources; and whether the agreed-upon terms fall clearly within the range of possible outcomes had the parties fully litigated the dispute.[2] The Commission also has considered factors such as whether the settlement negotiations were at arm's length and without collusion, whether the parties were adequately represented, and how far the proceedings had progressed when the parties settled. The Commission will not approve a settlement unless it is “reasonable in light of the whole record, consistent with law, and in the public interest.”[3]

Before a utility enters into any renegotiation of a QF power purchase agreement, it presumably has evaluated the strength of the other party's position. If the other party does not have a unilateral right to make modifications to the contract, then the utility should determine what reasonable concessions can be obtained in exchange for the contract modification sought by the other party.[4]

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[2] Decision (D.) 96-05-070, *mimeo.*, at 5, 66 CPUC2d 314, 317 (1996), *see also* D.96-12-082, *mimeo.*, at 9, 70 CPUC 427, 430 (1996), *Re Pacific Gas and Electric Company*, D.88-12-083, 30 CPUC2d 189, 222 (1988).

[3] Commission Rules of Practice and Procedure, Rule 51.1(e).

[4] D.98-06-021, 1998 Cal. PUC LEXIS 474, at *15, citing D.98-04-023, *mimeo.*, at 13, and D.87-07-026.

The simple conclusory assertion that a dispute exists is not sufficient grounds to modify a contract.[5]

B. Application of Test Approving Settlement Agreements to This Proceeding

The settlement presented in this application would resolve the following several interrelated disputes. SCE's application states SCE followed several basic principles in negotiating the settlement:

- The settlement must resolve all disputed issues as required by Commission precedent;
- SCE would not pay any consideration to settle noncontract claims, such as fraud or discrimination;
- The settlement would not set a precedent for SCE's transaction with other power suppliers;
- The settlement would be confidential;
- The settlement must result in substantial ratepayer benefits considering the relative merits of the parties' claims and litigation risks;
- The settlement would require Commission approval (except for the terms relating to metering);
- The settlement would restore the contract capacity of the Salton Sea 2 Project to 15,000 kilowatt.

Applying these principles, SCE signed a settlement with Sellers that resolves all outstanding litigation. Sellers filed the first lawsuit in December 2001 alleging that SCE breached seven contracts by failing to make capacity bonus payments Sellers believe are owed for power deliveries to SCE from October 2001 through May 2002. The second lawsuit filed against SCE in January 2003 alleges SCE improperly reduced power payments to Sellers

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[5] *See also* D.98-04-023.

following a failure of one of Seller's turbine-generators. SCE denied liability and filed cross-complaints in both cases. The lawsuits were filed in Imperial County Superior Court. The parties signed the subject settlement following discovery, negotiations before a settlement judge, and voluntary mediation. SCE's asserts the settlement provides substantial benefits to ratepayers and avoids the risks and costs of extensive litigation.

The settlement is a complex agreement involving complicated facts and disputes. The lawsuits evolve from settlement agreements approved by this Commission in D.01-07-031 and D.02-01-033. Those settlements resolved disputes between SCE and Sellers involving circumstances arising out of the energy crisis and the Commission's response to market failures in 2000 and 2001.

Briefly, California’s energy crisis created financial burdens for California utilities, motivating SCE to suspend some or all payments to QFs beginning November 2000. Sellers were among those QFs whose payments were suspended and filed suit in Imperial County Superior Court seeking compensatory damages. SCE filed a cross-complaint alleging Sellers had unlawfully transferred power so as to increase contract payments by SCE and asserting the Commission had sole jurisdiction over these matters. The Court, in March 2001, found that Sellers had a right to suspend power deliveries to SCE. A few days later the Commission issued D.01-03-067, modifying the formula that governs payments to QFs. SCE resumed payments to Sellers thereafter as ordered by D.01-03-067 but Sellers declined to deliver power to SCE on the basis that SCE had not paid for power delivered between November 1, 2000 and March 22, 2001. SCE filed suit in Imperial County Superior Court, asking the Court to reconsider its previous judgment on the ground that the Commission has sole jurisdiction over such matters. The Court declined the matter on jurisdictional grounds but modified the previous judgment to terminate relief effective June 18, 2001. SCE and Sellers subsequently entered into a Settlement that reflected D.01-06-015, adopting agreements for settlement of SCE disputes with QFs. The Commission approved this settlement and a modification to it in D.01-07-031 and D.02-01-033, respectively. SCE made its final payment under the agreement on March 1, 2002 and the parties dismissed pending lawsuits and appeals in July 2002.

The settlement before us would resolve remaining disputes as follows:

> **Bonus Payment Dispute.** Under existing contracts, Sellers are entitled to a bonus payment for meeting certain performance criteria. The parties have disputed the amount of bonus payments due Sellers for the period October 2001 through May 2002. Sellers allege SCE owes them $3.861 million. SCE does not dispute the amount that would have been owed to Sellers but for the dispute over whether the payment is required.
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> **Deration Dispute**. Under existing contracts, SCE may derate a power unit if it is has not met certain capacity during peak periods. Deration under such circumstances reduces capacity payments to Sellers retroactively and in future periods. Deration is not permitted when capacity is not delivered as a result of an "uncontrollable force." Sellers claimed their failure to produce capacity for Salton Sea 2 during contract periods resulted from an uncontrollable force when their plant went down. SCE did not agree with the claim after reviewing Sellers' documents and derated the plant accordingly. The amount in dispute for this matter is $1.642 million.
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> **Energy Sharing Dispute.** SCE alleges that Sellers violated a contract term for Salton Sea 4 plant by diverting power contractually dedicated to SCE in order to maximize revenues.
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> **Metering Dispute.** The contracts permit SCE to require Sellers to install certain metering equipment at Sellers' expense. Sellers failed to comply with SCE's written demand to install meters.

> **Project Maintenance Dispute.** Existing contracts provide for scheduled maintenance, which may not be undertaken during peak months. SCE calculated capacity payments for certain periods when Salton Sea 1 and 2 were offline for maintenance. The calculation included a proxy to calculate the capacity payments that would have been made absent the down time. Sellers disputed the use of the proxy, which SCE maintained was fair and appropriate.

The settlement resolves these outstanding disputes as follows:

- Requires SCE to pay Sellers $2.488 million;
- Requires SCE to rerate Salton Sea 2's capacity back to 15 megawatt, effective October 1, 2002, putting Sellers in the same position they would have been in without a deration;
- SCE will pay the cost of new metering equipment (about $20,000) and parties agree to schedule energy deliveries from all plants on a "real-time" basis, working with the Independent System Operator to implement dynamic scheduling;
- Salton Sea pays the cost of telecommunications for new metering equipment and data transmission;
- Parties will withdraw all pending claims and lawsuits.

The settlement presented in this application reflects the relative risks and costs of litigation. Its terms lie within the range of possible outcomes had the matter gone to trial.

There is no evidence of collusion; indeed, the evidence suggests the parties aggressively pursued their respective interests in the case up until the time of settlement and that the parties negotiated the settlement in good faith and with the knowledge of the court and a bona fide mediator.

Finally, the parties were well aware of their respective positions given that they engaged in written discovery prior to settlement. Thus, the settlement meets the test of reasonableness and should be approved. SCE should be allowed to recover the settlement payments in its rates.

C. Confidentiality of Settlement Terms and Conditions

SCE seeks confidential treatment of any information reflecting the terms of its settlement with Sellers. SCE justified its claim on the grounds that (1) the settlement agreement itself contains a confidentiality clause that prohibits SCE from revealing the settlement's terms; (2) the settlement terms are confidential and proprietary to SCE because disclosure could cause SCE competitive harm in negotiating settlements of future disputes involving similar issues.[6] As to this latter argument, SCE pointed out that disclosure of the settlement terms would impair SCE's ability in the future to obtain the best possible settlements on behalf of its ratepayers.

In other similar applications, SCE has made public the aggregate settlement payments even while asserting the need for confidentiality of individual payments. For example, in D.98-12-072, SCE disclosed aggregate payments as a means of settling a dispute over its entitlement to a protective order.

We find that the amount of liability assumed by SCE's ratepayers as a result of the settlement should be publicly disclosed for the purpose of facilitating accountability. This order also discloses the circumstances underlying the parties' disputes and a simple description of associated settlement terms. We do not find that disclosure of this information would jeopardize ratepayers by revealing the settlement terms to other potential litigants. The facts of the case and settlement terms are sufficiently complex that

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[6] Motion for Protective Order, filed July 11, 2003.

other parties would not be advantaged by knowledge of major settlement terms in isolation from more detailed information about the settlement. We have carefully tailored this order to ensure that it does not provide enough information about the settlement or its circumstances to compromise SCE's future negotiations.

We, therefore, grant SCE's motion for protective order to the extent that we will retain its application and associated documents under seal and do not publish the settlement in its entirety but only disclose certain significant aspects of the settlement in the interests of promoting a full and public process.

D. Conclusion

The settlement resolves extraordinarily complex matters relating to the operation of and payments to Salton Sea projects for electricity deliveries under various contract terms. It would result in the dismissal of two lawsuits filed by Salton Sea plus cross-claims asserted by SCE.

Because disclosure of the precise settlement terms may compromise negotiations by SCE in future similar circumstances, we do not elaborate here on the terms of the settlement. We do however disclose the most essential elements of the settlement and the financial liabilities that SCE's ratepayers assume as a result of the settlement.

We herein find the settlement agreement is reasonable and in the public interest.

4. Public Comment and Publication of Draft Decision

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

5. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Kim Malcolm is the assigned ALJ in this proceeding.

Findings of Fact

1. The subject settlement resolved outstanding litigation and associated risk and cost. There is no evidence of collusion or other improper conduct by either party. The settlement follows negotiations before a settlement judge and a mediator.

2. The terms and conditions of the settlement are considered confidential by the parties, although SCE furnished the Commission with full details of the settlement under seal.

3. No party protested the application.

4. SCE has sought a protective order for certain portions of its application and exhibits on the ground that dissemination of the contents of these documents would harm SCE and ratepayers. No harm would result if the Commission were to disclose the aggregate sum of the settlement and basic settlement terms in order to facilitate accountability on behalf of SCE's ratepayers.

5. No hearing is necessary.

Conclusions of Law

1. The settlement agreement between SCE and Sellers is reasonable in light of the whole record, consistent with law, and in the public interest.

2. The application should be granted as provided in the following order.

3. SCE should be allowed to recover the settlement payments in its rates.

4. SCE's motion for protective order should be granted except to the extent that this order discloses certain elements of the settlement agreement.

5. In order that benefits of the settlement agreement may be realized promptly, this order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The application of Southern California SCE Company (SCE) for approval of the settlement of litigation between SCE and Salton Sea Power Generation L.P. et al (Sellers) as set forth in Exhibit SCE-4 to the application, is granted.

2. SCE shall be allowed to recover the settlement payments in its rates.

3. SCE's motion for a protective order is granted to the extent set forth below:

    a. Designated portions of SCE's application and Exhibits, which SCE filed under seal as an attachment to its motion for protective order, shall remain under seal for a period of two years from the date of this decision. During that period, the foregoing documents or portions of documents shall not be made accessible or be disclosed to anyone other than Commission staff except on the further order or ruling of the Commission, the Assigned Commissioner, the assigned Administrative Law Judge (ALJ), or the ALJ then designated as Law and Motion Judge.

    b. If SCE believes that further protection of this information is needed after two years, it may file a motion stating the justification for further withholding the material from public inspection, or for such other relief as the Commission rules may then provide. This motion shall be filed no later than 30 days before the expiration of this protective order.

4. The Commission originally determined that hearings would be required in this proceeding. Because no party protested this application and there exist no outstanding factual matters, the Commission herein determines that no hearings are needed in this proceeding

5. This proceeding is closed.

This order is effective today.

Dated ________________, at San Francisco, California.